

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.622(i),)	MB Docket No. 09-230
Post Transition Table of DTV Allotments,)	RM-11586
Television Broadcast Stations)	
(Seaford, Delaware))	

MEMORANDUM OPINION AND ORDER

Adopted: February 12, 2013

Released: February 13, 2013

By the Chief, Video Division, Media Bureau:

I. INTRODUCTION

1. The Media Bureau, Video Division has before it a petition filed by Broadcast Maximization Committee (BMC) seeking reconsideration of the Report and Order to amend the Post-Transition Table of DTV Allotments¹ to allot channel 5 to Seaford, Delaware.² For the reasons set forth below, we deny BMC's petition for reconsideration.

II. BACKGROUND

2. The Media Bureau, Video Division issued a *Notice of Proposed Rulemaking* on December 18, 2009,³ proposing to allot channel 5 to Seaford as Delaware's first very high frequency (VHF) commercial television channel, pursuant to Section 331(a) of the Communications Act of 1934 (the Act), as amended.⁴ That section provides, in pertinent part, that it shall be Commission policy "to allocate channels for [VHF] commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if technically feasible." The only VHF channel allotted to Delaware at that time was reserved for noncommercial educational use.⁵

3. The Division adopted this proposal in 2010, and in response to a request from Senator Ted Kauffman that the new Delaware VHF allotment be constructed in a manner to reach the greatest number of Delawareans, the Division explained that the allotment of a new channel in Southern Delaware would result in a more equitable distribution of channels.⁶ The *Report and Order* also rejected BMC's argument that the Commission should avoid proposing new channel allotments on channels 5 and 6 given the pendency of the proposal in the *Diversity Proceeding* to reallocate those channels to the FM radio service, because that proceeding remains pending and the Commission did not impose a freeze on the use of those

¹ 47 C.F.R. § 73.622(i).

² *Seaford, Delaware*, Report and Order, 25 FCC Rcd 4466 (MB Vid Div. 2010) (*Report and Order*).

³ *Seaford, Delaware*, Notice of Proposed Rule Making, 24 FCC Rcd 14596 (MB Vid Div. 2009) (*Notice*).

⁴ 47 U.S.C. § 331(a).

⁵ *Notice*, 24 FCC Rcd at 14596 n.2.

⁶ *Report and Order*, 25 FCC Rcd at 4470-71.

channels in connection with the *Diversity Proceeding*.⁷ The *Report and Order* further explained that should channels 5 and 6 be reallocated to the FM radio service, and the Commission were to require television licensees to vacate channels 5 and 6, the Bureau will consider a channel substitution at Seaford at that time. In a footnote to that explanation, the Bureau also stated that BMC's reply comments' counterproposal to allot either channel 2 or 3 to Seaford is not entitled to consideration because BMC did not advance it until the reply comment stage.⁸

4. In its petition for reconsideration, BMC criticizes the Bureau's decision in the *Notice*, maintaining that the Bureau has taken "the unusual step of proposing the allotment of channel 5 at Seaford, despite the fact that no party had expressed an interest in this proposal."⁹ BMC states that "[t]his procedure is unprecedented and contrary to the manner in which all other allotments are proposed pursuant to Section 307(b) of the Communications Act of 1934, as amended."¹⁰ BMC also argues that the Bureau "incorrectly believed that neither channel 2 or 3 could be considered because they were counterproposals and could not be offered at the reply stage,"¹¹ and that the Bureau erred when it refused to consider channels 2 or 3 as alternatives to channel 5. BMC states that its proposal to allot either channels 2 or 3 to Seaford, rather than channel 5, during the reply stage of the proceeding did not serve as a counterproposal, because "[a] counterproposal is a proposal which is mutually exclusive or conflicts with the channel proposed in the proceeding,"¹² and that "[n]either channel 2 or 3 conflicted with Channel 5 at Seaford and therefore BMC was not required to propose either of these channels at the comment deadline."¹³

5. PMCM TV, LLC (PMCM) submitted a Qualified Opposition to Petition for Reconsideration, stating that it has filed notifications with the Commission requesting, pursuant to section 331(a) of the Act, reallocation of channels 2 and 3 in Nevada and Wyoming to channel 2 in Wilmington, Delaware and channel 3 in Middletown Township, New Jersey, and that BMC's counterproposal therefore cannot be considered prior to Commission action on those notifications.¹⁴ Nave Broadcasting, LLC (Nave) filed responsive comments to clarify that it supports the allotment, and would file an application for either channel 3 or 5, as available.¹⁵ BMC submitted a reply asserting that regardless of

⁷ *Id.* at 4472 (citing *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922 (2008)).

⁸ *Id.* at 4472 n.42 (quoting 47 C.F.R. § 1.420(d) ("Counterproposals shall be advances in initial comments only and will not be considered in reply comments.")).

⁹ Petition for Reconsideration at 2.

¹⁰ *Id.*

¹¹ *Id.* at 3.

¹² *Id.* (citing *Pinewood, South Carolina*, Memorandum Opinion and Order, 5 FCC Rcd 7609, 7609-10, para. 8 (1990); *Lafayette, Louisiana*, Memorandum Opinion and Order, 3 FCC Rcd 4616 (MM Bureau 1988)).

¹³ *Id.*

¹⁴ PMCM Opposition at 1. On December 14, 2012, the U.S. Court of Appeals for the D.C. Circuit reversed the Commission's decision to deny PMCM's request, and instructed the Commission to approve the reallocation. *PMCM TV, LLC v. FCC*, 701 F.3d 380 (D.C. Cir. 2012) (*PMCM TV*).

¹⁵ Nave filed a request for leave to file comments in response to BMC's reply. Although Nave's comments were submitted outside the pleading cycle established in the Commission's Rules, see 47 C.F.R. § 1.106, the comments clarify a matter raised in BMC's reply regarding Nave's interest in applying for a channel allotted to Seaford. Thus, we will exercise our discretion and consider Nave's August 20, 2010 responsive comments.

the merits of PMCM's claims to channels 2 and 3 in Delaware and New Jersey, the Commission's selection of channel 5 in Seaford, Delaware was ill-advised.¹⁶

III. DISCUSSION

6. We deny BMC's request for reconsideration of the *Report and Order*. We are not persuaded to reconsider simply because the proposed allotment in the *Notice* was not in response to the request of any one party, and therefore "unusual," and that such a "procedure" is unprecedented.¹⁷ First, we emphasize that the decisions that we made in the *Notice* and the *Report and Order* were intended to serve the public interest and comply with section 331's VHF policy.¹⁸ Section 331 poses a somewhat unique circumstance compared to other allocations, by imposing a policy of allocating at least one VHF frequency to each state, if technically feasible. Second, to the extent that a proposed allocation of this sort is unusual, BMC does not identify any impropriety or legal barrier to the adoption of a new approach. Third, a petition for reconsideration of a final order is not the appropriate vehicle to raise a challenge to, or otherwise reconsider, the legality of the issuance of an underlying notice of proposed rulemaking.

7. In light of the D.C. Circuit's recent decision in *PMCM TV*, we dismiss as moot BMC's argument that its request to allocate channel 2 or 3 at Seaford, rather than channel 5, did not qualify as a counterproposal. The Court's order in *PMCM TV* has directed the Commission to grant PMCM a license for channel 2 in Wilmington, Delaware, and a license for channel 3 in Middleton Township, New Jersey.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by Broadcast Maximization Committee IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau

¹⁶ BMC Reply at 1-2.

¹⁷ Petition at 2; *see also* Petition at 3 (arguing that where four parties opposed channel 5 and only one party expressed an interest in applying for channel 3, "it is difficult to understand why the Bureau believed it was in the public interest to allot Channel 5 when Channels 2 or 3 were viable options").

¹⁸ *See Report and Order*, 25 FCC Rcd at 4470.